Supreme Court, U.S.
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No. 92-1563

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GERALD B. WATSON, JR.,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

On December 4, 1988, an administrator discharged petitioner from employment in the Federal Aviation Administration for refusing a demand that he submit to the particular random drug test authorized by the agency.

1. Must the Federal Circuit Court of Appeals and the Merit Systems Protection Board defer to the finding of the administrative judge who determined, based upon the credibility of the administrator as a witness, that the administrator, in selecting a penalty, had not exercised any discretion, and thereby abused it?

2. May the Merit Systems Protection Board review an agency's penalty decision de novo, evaluate the circumstances anew, and regard the agency's failure of discretion to be immaterial?

3. Must an administrator consider that the agency's random drug testing was unlawful in the jurisdiction at the time, when he considers all circumstances relevant to the selection of a penalty for an employee's refusal to submit to the test?

4. Regardless who may exercise discretion, does the discharge of a long-term employee for refusal to submit to the agency's testing constitute an abuse of discretion or a capricious penalty, where the employee was not suspected of drug use, he had promptly volunteered an independent drug test showing him to be

"clean," and his objection was consistent with a judicial declaration in his jurisdiction that suspicionless drug testing was then unconstitutional?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gerald Bruce Watson, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in this proceeding on November 18, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is noted at 983 F2d 1088 (1992) (table). It is unpublished. The three opinions, including the dissent and a concurrence, are reprinted in the appendix. (App-1 to App-21) The final opinion of the Merit Systems Protection Board is reported at 49 MSPR 509 (App-22 to App-42). Its initial opinion by the administrative judge is reproduced in the appendix. (App-43 to App-71)

JURISDICTION

The decision of the United States Court of Appeals for the Federal Circuit was filed and entered on November 18, 1992. A timely petition for rehearing and suggestion for rehearing in banc was filed on December 2, 1992. The petition was denied December 29, 1992. This Court has jurisdiction pursuant to 28 USC § 1254(1).

STATUTES INVOLVED

The standard for discipline of a federal employee, 5 USC § 7513(a), provides:

> Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

The employee may seek review before the Merit Systems Protection Board pursuant to 5 USC § 7701(c)(1), which provides:

> Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision --
>
> (A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a of this title, is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.

The board's decision may be reviewed under 5 USC § 7703(a) and (b), which provides in relevant part:

> (a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.
>
> . . . . .
>
> (b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. . . .

The court's scope of review is described in 5 USC § 7703(c), which provides:

> In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be --
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence.

STATEMENT OF THE CASE

I. Removal from Service

Bruce Watson worked for the Federal Aviation Administration's field office in Eugene, Oregon. Over the course of eleven years, his work had been reviewed as fully successful. (App-81) About 11:45 a.m., August 18, 1988, his supervisor told him that drug testing people would test him at 1:30 p.m.[1] Mr. Watson was told the test was a random one, it was not related to his performance, and he was not suspected of using drugs. (App-82)

Mr. Watson sought legal advice. He found an attorney's name in the telephone directory listed under constitutional law. The attorney advised that the drug test was not legal. Coincidentally, the Ninth Circuit

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[1] Transcript of Hearing before the Merit Systems Protection Board, Seattle Regional Office, John W. Tapp, Administrative Judge, March 9, 1989, pp 46-47 (hereafter "Tr") (testimony of supervisor, Dean Stead).

Court of Appeals had ruled earlier that year that post-accident drug testing of railway employees, without individualized suspicion, was an unconstitutional search. *Railway Labor Executives' Ass'n v. Burnley*, 839 F2d 575 (Feb. 11, 1988), *rev'd, Skinner v. Railway Labor Executives' Ass'n*, 489 US 602; *National Treasury Employees Union v. Von Raab*, 489 US 656 (March 21, 1989). The attorney informed the supervisor that Mr. Watson had decided not to take the test. (Tr 47-48)

That afternoon, Mr. Watson told his lawyer he had nothing to hide. The attorney arranged an independent drug test at a local clinic. Within two hours of the FAA's intended test, Mr. Watson gave the clinic a sample for screening.[2] The results were negative in all particulars. Mr. Watson provided the agency with the test report, when received, on August 23, 1989. Mr. Watson discussed the test with the regional manager, Donald Coones and recounted that it showed he was not a drug user. (Tr 22 & 48) The manager admitted that he had no reason not to believe Mr. Watson. (Tr 22)

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[2] Tr 48-49; International Clinical Laboratories, Inc., Drug Test Results; Collected August 18, 1988; Report, August 22, 1988: Appellant Exhibit E, from Hearing Before Administrative Judge (March 9, 1989).

Nonetheless, on August 31, 1989, the regional manager suspended Mr. Watson and notified him that the FAA intended to remove him from federal employment on grounds that he had refused to provide a urine specimen as part of the authorized drug test program. Quoting FAA Order 3910.6, the manager wrote:

> Refusal to submit to testing, or failure to cooperate with the collection procedures will be grounds for removal from the Federal service.

(Letter, Coones to Watson (Aug. 31, 1989): Agency Exhibit 19; see also Order 3910.1, Section 1(C) [App-77]).

Mr. Watson sought a declaration and an injunction in the United States District Court for the District of Oregon. The court dismissed, finding the sole remedy to be the Civil Service Reform Act, 5 USC § 7501 *et seq.*[3] In the meantime, Mr. Watson wrote manager Coones, incorporated his constitutional objections to suspicionless drug testing, and contended that dismissal was unwarranted.

Finding discipline warranted, the manager determined the penalty. He said no one directed him to remove Mr. Watson (Tr 26), but, "to some point," he felt constrained to remove (Tr 35). The manager gave

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[3] Slip Opinion, *Watson v. United States,* Case No 8806363-E (D Or, Oct. 25, 1988).

"very limited consideration" to doing something else to Mr. Watson. (Tr 27) He testified that he looked for extenuating circumstances or any reason not to proceed with "the normally prescribed adverse action that was required." (Tr 24) He looked for something to say that this was not "just a direct case of refusal to submit [a] specimen," but he found no mitigating circumstances. (Tr 24-25)

When asked at hearing to describe mitigating circumstances that would permit a lesser penalty, he offered two: one where a drug user enters rehabilitation, and a second where the employee had never received notice of the testing program. (Tr 32-33) When asked for other mitigating circumstances he would consider, he testified "Those are the two that come to mind, obviously. I can't think of any others." (Tr 33)

On November 10, 1988, the manager wrote Mr. Watson to announce that he would be removed from federal service effective December 4. (DOT Removal Letter)

II. Proceedings Below

Mr. Watson sought review before the Merit Systems Protection Board (hereafter "MSPB"). On April 21, 1989, administrative judge John W. Tapp found from the manager's demeanor that he was not credible when claiming to have exercised some discretion when reviewing the penalty. The administrative judge declared:

> Finally, Donald Coones, purportedly the proposing and deciding official in this case, left me with the clear impression that he had merely gone through the motions of decision-making. In response to the agency representative's question whether he had "felt constrained by the program's requirement for removal," he responded, "to some point" (Tr 35-36), but still maintained he had discretion to select a lesser penalty. (Tr 25) I did not find him convincing on this point. Neither his affect, his demeanor, nor the substance of his responses suggested that he had in fact exercised any discretion.

(App-58) The administrative judge reinstated Mr. Watson with backpay, finding the agency had abused its discretion in imposing removal, and he ordered that a 45 day suspension be imposed instead.

On July 25, 1991, the MSPB reversed the initial decision and sustained the agency's decision to discharge Mr. Watson. On November 18, 1992, the Federal Circuit sustained the board's decision. Judge Pauline Newman dissented (App-8 to App-16), and Judge Paul Michel responded to the dissent in a concurring opinion (App-17 to App-21).

REASONS FOR GRANTING THE WRIT

I. *Contrary to the decisions of this court, the Federal Circuit sanctions the disregard of an administrative judge's credibility determination concerning a live witness and permits the reassessment of the witness's credibility from a written record.*

A. Importance of Discretion

An agency may discipline an employee "only for such cause as will promote the efficiency of the service." 5 USC § 7513(a). The Merit Systems Protection Board construes this standard to pose two separate questions, described as nexus and penalty. First, did the agency demonstrate a relationship or nexus between the employee conduct and the efficiency of the service? Second, did the agency consider the relevant factors of the particular case and arrive at a penalty that was within the "tolerable limits of reasonableness?" *Douglas v. Veterans Administration*, 5 MSPB 313, 328-29 (1981). The Federal Circuit reviews to determine whether there was substantial evidence to support the nexus determination, and whether the agency's penalty was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 USC § 7703(c); *see, e.g., Graybill v. United States Postal Service*, 782 F2d 1587 (1986); *Hayes v. Department of the Navy*, 727 F2d 1535, 1537 & 1540 (1984). This court has recognized that an administrator abuses

discretion, when failing to consider all the relevant factors. Even more fundamentally, an administrator abuses discretion, when failing to exercise it. *See Citizens To Preserve Overton Park, Inc.*, 401 US 402, 416 (1971) (reversed and remanded for demonstration whether and how administrator considered factors concerning a highway crossing a park).

B. No Discretion Exercised

One person alone made the decision to discharge Bruce Watson. (Tr 20) That person, Donald Coones, claimed to have had discretion. (Tr 37) The administrative judge observed Mr. Coones testify, expressly found that his demeanor revealed him not to be believable, and concluded that he had not exercised any discretion. (App-58) Indeed, the only two mitigating circumstances, which Mr. Coones recognized, were not matters of his discretion but were prohibitions on discipline, which were mandated by rule.[4]

C. Credibility Disregarded

The board and court below disregarded this credibility determination by reasoning that just because Mr. Coones could only recall only two potentially

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[4] *See* Exec Order 12564, § 5(b), 51 Fed Reg 32889 (1986) (no discipline if drug user enters rehabilitation); DOT Order 3910.6 (3910.1), Ch III, §§ 5 & 6 (advance notification of testing required).

mitigating circumstances did not mean he would not consider others. (App-3 [majority opinion]; App-36 to App-37 [board decision]) The board and court preferred to take Mr. Coones' statements at face value based on the written record. (*Id.*)

The court below was quite correct that, in circumstances where the board articulates a sound reason based on the record, the board may evaluate testimony differently. *Jackson v. Veterans Administration*, 768 F2d 1325 (Fed Cir 1985). Additional independent evidence may make a credibility determination less decisive. 768 F2d at 1333 (presiding official overlooked other witness). In a similar way, the Ninth Circuit Court of Appeals employs a distinction between testimonial inferences, which an administrative judge draws while watching testimony, and derivative inferences, which anyone may draw based on the objective content of the testimony. *Penasquitos Village, Inc. v. National Labor Relations Board*, 565 F2d 1074, 1078-79 (9th Cir 1977). A board may reasonably draw derivative inferences *from testimony that has not been discredited* so as to reach an ultimate conclusion that differs from the administrative judge. However, a board may not dispute the administrative judge's testimonial inferences. *Id.* In this case, the Federal Circuit had no reason to reassess Mr. Coones' credibility. Precisely because he was not believable, his statements cannot be given new inferences.

There was nothing outside his testimony to make his credibility immaterial. The board and court noted that, at the hearing following discharge, the agency submitted the affidavit of Melissa Allen, an official from Washington, D.C. (App-3; App-35 to App-36) Her affidavit asserted that at some undescribed time and place, for reasons not explained, the agency had chosen not to discharge two unnamed employees for failure to cooperate in drug testing. Ms. Allen, however, was never shown to have had any involvement in the slightest with the circumstances leading to Mr. Watson's discharge. (*See* Tr 18, 20 & 26) Her affidavit might be relevant to rebut a charge that the agency on the whole invokes a predetermined penalty, but, as for Mr. Watson's circumstances, her affidavit is irrelevant. It cannot be "a sound reason based on the record" for disregarding Mr. Coones' credibility. It is only his failure to exercise discretion that matters.

D. Conflict With This Court

This court recognizes that the significance of a credibility finding depends upon the importance of credibility in a particular case. *Universal Camera Corp. v. National Labor Relations Board*, 340 US 474, 496 (1951). This case turns upon Mr. Coones' credibility. The administrative judge is the only one who "can be aware of variations in demeanor and tone of voice that bears so heavily on [the] listener's understanding and belief in what is said." *See Anderson v. City of Bessemer City*, 470 US 564, 575 (1985). Because this case depends on demeanor, there are "compelling and

familiar justifications" for according weight to the administrative judge's findings. *See Miller v. Fenton*, 474 US 104, 114 (1985). Having heard the evidence and seen the witnesses, the administrative judge is best qualified to have decided whether Mr. Coones truly exercised any discretion. *See Universal Camera Corp. v. National Labor Relations Board*, 340 US at 494. Because the decision of the Federal Circuit conflicts directly with the decisions of this court, and because its decision represents a departure from the accepted and usual course of proceedings, this court should grant review.

II. *Contrary to 5 USC § 7701(c)(1), the Federal Circuit invites the Merit Systems Protection Board to review an agency's penalty decision de novo and substitute board review after-the-fact for agency discretion before-the-fact.*

A. After-Discharge Discretion

The Federal Circuit determined that the discharge is defensible because the Merit Systems Protection Board has exercised discretion. The court stated:

> Here, the full Board examined all the evidence and concluded that the factors supporting mitigation were simply outweighed by those supporting removal.

(App-4; *see also* App-21 [Michel, J., concurring] [concluding that the board did not abuse *its* discretion]). The court's rationale enlarges the board's scope of review beyond the bounds of federal statute and the board's decisional law.

B. Scope of Board's Review

Subject to review for abuse, federal statutes place discretion in the hands of the agency, not any reviewing body. At 5 USC § 7513, it is "*an agency*" that is authorized to discipline an employee for such cause as promotes the efficiency of the service. The employee's recourse is an "*appeal*" to the board. 5 USC § 7513(d). Although the board's scope of review is broader in some respects, "*the agency decision*" remains the focus of attention. Subsection (c)(1) of 5 USC § 7701 provides in relevant part:

> [T]he *decision of the agency* shall be sustained under subsection (b) only if the *agency's decision* --
>
> (A) in the case of an action based on unacceptable performance described in section 4303 . . . is supported by substantial evidence, or
>
> (B) in any other case, is supported by a preponderance of the evidence.

(Emphasis added.) These standards of review recognize a difference in the issues before the board. Matters of performance are reviewed only for substantial evidence. Other matters require a preponderance of the evidence. *Id.* And, claims of flaws in agency procedures require proof of "harmful error." 5 USC § 7701(c)(2); 5 CFR § 1201.56(c)(3).

It is true that the board has described its preponderance review as *de novo* review. *Douglas v. Veterans Administration*, 5 MSPB 313, 316 (1981). This is true of review, for example, where finding facts that reflect a nexus between employee conduct and the efficiency of the service. The choice of a penalty, however, is a different issue. The statutes do not suggest that the board may simply substitute its review for the agency's discretion in selecting a penalty. The statutes do not suggest that the board may justify a penalty after discharge in lieu of agency discretion in the first instance. Employee discipline remains an "agency decision" taken in the exercise of agency discretion.

With regard to the penalty issue, the board previously construed its statutory authority carefully. In *Yeager v. General Services Administration*, 39 MSPR 147 (1988), the board summarized:

> The Board will review an agency-imposed penalty only to determine if the agency conscientiously considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See*

> *Douglas v. Veterans Administration*, 5 MSPB 313, 5 MSPR 280, 306 (1981). Only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. *Id.* In making such determinations, the Board gives due weight to the *agency's primary discretion* in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's responsibility, but to assure that managerial judgment has been properly exercised.

(Emphasis added.) If the agency has responsibility to exercise its discretion but it fails to do so, the discharge cannot be rationalized after the fact by a board decision. The board cannot say, "Well, we would have reached the same decision anyway."

C. Danger in New Scope of Review

In an analogous setting, the Interstate Commerce Commission demoted two employees. The employees contended that the decision amounted to a reduction in force without the requisite procedural protections. The Merit Systems Protection Board affirmed, finding that the employees would not have fared better with proper

RIF procedures than with the board's compromise. Citing a decision of this Court, the Court of Appeals for the District of Columbia rejected the attempt at after-the-fact rationalization. The court explained:

> In *SEC v. Chenery*, 3323 US 194, 67 SCt 1575, 91 LEd 1995 (1947), the Supreme Court set forth a "simple but fundamental rule of administrative law." *Id.* at 196, 67 SCt at 1577. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. *Id.* (emphasis added). The rationale of this rule is clear. "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. . . . [A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." The same rationale applies when the reviewing body is an administrative tribunal rather than a court. Simply put, the Board should not be in the business of affirming administrative decisions based upon how an

> agency might have acted if it had followed proper procedures. *The role of review is to evaluate agency discretion as it has been exercised.*

Horne v. Merit Systems Protection Board, 684 F2d 155, 157-58 (DC Cir 1982). The board's decision was vacated, and the matter remanded to the ICC to exercise its discretion in following the proper RIF process, which may or may not have allowed the employees better protection.

For the same reasons, the Federal Circuit may not invite the board to rationalize this discharge after the fact. First, the statutes require that discipline must occur with an *agency decision* in the exercise of the agency's discretion. *See* 5 USC § 7513; 5 USC § 7701(c)(1). Second, review cannot substitute for discretion. Such review denies the employee the right to have had discretion exercised, before decision, on a local level, one on one, with a full review of all the mitigating circumstances, and with a chance at a lesser penalty. Third, such review will be inherently biased toward sustaining the decision already reached, rather than beginning with a fresh review of available options.

D. Importance of Issue

The question of the board's scope of review on penalties is an important federal statutory issue. The board's jurisdiction is national and the Federal Circuit reviews all board matters. 5 USC § 7703(b). The

board's decision, as shown by the court's reading of it, will have national ramifications potentially affecting all federal employees. The review statute, 5 USC § 7701(c)(1), is subject to misunderstanding and needs clarification. This court has visited the statute, but has not yet construed it. *Cornelius v. Nutt*, 472 US 648, 660-62 (1985) (MSPB's harmful error rule); *see also Department of the Navy v. Egan*, 484 US 518 (1988); *Lindahl v. Office of Personnel Management*, 470 US 768 (1985). For these reasons, the court should grant review.

III. *As a new development in federal law, the Federal Circuit permits the agency to disregard, among circumstances relevant to choice of a penalty, (a) the employee's right to rely upon decisional law of his jurisdiction and (b) the agency's obligation to comply with that law at the time of its order.*

A. Discipline in Context

The central fact in this case is that on February 11, 1988, the Ninth Circuit Court of Appeals declared post-accident drug testing of railway employees to be an unconstitutional search, where individualized suspicion was lacking. *Railway Labor Executives' Ass'n v. Burnley*, 839 F2d 575. Until reversed a year later in *Skinner v. Railway Labor Executives' Ass'n*, 489 US 602; *National Treasury Employees Union v. Von Raab*, 489 US 656 (March 21, 1989), that judicial declaration

represented the law as it was understood in Mr. Watson's region of the country. It was during this year's time when the agency pressed forward with suspicionless drug testing and during this time when Mr. Watson objected to testing but still supplied a prompt independent test.

On the same day that he tendered a "clean" test result, Mr. Watson sought a judicial determination of the constitutionality of the agency's testing.[5] He cited the *Burnley* decision, among others.[6] He incorporated the court documents by reference in his response to the agency manager, who was then considering discharge.[7] The seeming unlawfulness of the agency's direction to Mr. Watson was unmistakably a circumstance relevant to the exercise of discretion in selecting a penalty.

Yet, the manager looked for only two situations as potentially mitigating circumstances: a drug user who begins rehabilitation or an employee without notice of the testing program. (Tr 24, 25, 27, 32, 33, 36 & 37)

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[5] Complaint, *Watson v. United States*, No. 88-6363-E, (D Or, August 23, 1988).

[6] Request for Temporary Restraining Order, p 15, *Watson v. United States*, No 88-6363-E, (D Or, September 27, 1988).

[7] Letter, Michael McGrady (attorney) to Donald G. Coones (sector manager) (October 5, 1988): Agency Exhibit 21 (Tab D).

Even if credibility problems are put aside, Mr. Coones' testimony reveals that he did not consider the then apparent unconstitutionality of the agency's order to Mr. Watson as a mitigating circumstance. Even if board review could substitute for agency discretion, the board did not consider the seeming unlawfulness of the agency's order among the mitigating factors it discussed. (App-38 to App-40)

B. Prerequisite to Discretion

This Court understands that a prerequisite to discretion is that the agency must have considered the relevant factors. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US 402, 416 (1971). At least until now, the Federal Circuit has reviewed to assure "that the agency considered all factors relevant to the case." *See, e.g., Hayes v. Department of the Navy*, 727 F2d 1535, 1537 (1984). Similarly, the board has listed at least a dozen factors for consideration in determining a penalty. *Douglas v. Veterans Administration*, 5 MSPB 313, 331 & 332 (1981). The Federal Circuit has found that the board's "failure to consider a significant mitigating circumstance constitutes an abuse of discretion." *VanFossen v. Department of Housing & Urban Development*, 748 F2d 1579, 1581 (Fed Cir 1984).

This case, therefore, poses novel questions. After finding that the employee *is* subject to at least *some* discipline for disobedience with an agency direction, must the agency consider as a mitigating circumstance the seeming unlawfulness of the agency's direction? The

employee may not be able to avoid discipline entirely, in as much as the federal service generally requires that the employee "comply now, grieve later." *Gragg v. United States Air Force*, 13 MSPR 296 (1982). But, within the context of the penalty phase, is the employee's good faith reliance upon the actual (not merely asserted) decisional law of his jurisdiction a relevant circumstance that must be considered? What was the agency's obligation to comply with that decisional law at the time of its order? Is the agency's obligation to have given a lawful order relevant to punishing the employee for disobeying it?

C. Undecided Question of Federal Law

The decisions below in this case represent a new development in federal law suggesting that the lawfulness of the agency's order need not be considered among factors relevant to the exercise of discretion. (App-20 [Michel, J. concurring]). This development is inconsistent with this Court's view that consideration of relevant factors is a prerequisite to discretion. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US at 416. The employee's reliance on a judicial declaration and the agency's obligation to honor that declaration should be relevant to the exercise of discretion. Because this is a new issue of importance to the entire federal service, this court should grant review.

IV. *The Federal Circuit sanctions an abuse of discretion whereby a long-term employee is discharged, although he was not suspected of drug use, he demonstrated he was drug free, and he relied upon a judicial determination at the time.*

A. Abuse of Discretion

Regardless whether the firing official exercised any discretion, regardless whether the board may substitute its discretion, regardless whether a decision-maker must consider the temporal unlawfulness of the agency's order, this case ultimately asks whether firing Bruce Watson reflects an abuse of discretion. For several reasons, the question is compelling.

First, it is this Court's decision *after* his objection, that placed Mr. Watson in jeopardy. If the Ninth Circuit had been sustained, the agency's order to him would have remained unlawful and his discharge, upon review, would not likely have been sustained by the board. In a different setting, this Court observed that the prior statute, which authorized discipline, was not intended to authorize discharge for speech that is constitutionally protected. *Arnett v. Kennedy*, 416 US 134, 163 (1974). Presumably, the successor statute, 5 USC § 7513(a), would not authorize discharge for an employee's objection to an unlawful search and seizure.

Second, the decisions here are inconsistent with decisions in other courts which found penalties to be arbitrary, capricious, and abuses of discretion. *See, e.g., Brown v. United States Postal Service*, 860 F2d 884 (9th Cir 1988) (willful failure to follow postal procedures; removal reversed as overly harsh); *McLeod v. Department of the Army*, 714 F2d 918 (9th Cir 1983) (marijuana possession at lunchtime; removal reversed as arbitrary and capricious; remanded); *Young v. Hampton*, 568 F2d 1253 (7th Cir 1977) (conviction for cannabis possession off duty; removal reversed as arbitrary, capricious, and abuse of discretion); *Boyce v. United States*, 211 Ct Clms 57 (1976) (IRS employees' failures to file tax returns; removals reversed as disproportionate to offense); *Power v. United States*, 531 F2d 505 (Ct Clms 1976) (alleged false expense claims; removal not reversed but backpay ordered); *Jacobowitz v. United States*, 191 Ct Clms 444 (1970) (IRS officer's grossly negligent failure to process checks; removal reversed); *Clark v. United States*, 162 Ct Clms 476 (1963) (spouse's use of government auto; removal reversed).

Third, the decisions below are contrary to fundamental concepts in American law. This Court has refused to sustain the convictions of persons who were denied the chance to prove that their prosecutions were based upon an invalid administrative order. *Estep v. United States*, 327 US 114, 125 (1946) (Muprhy, J., concurring) (refusal to submit to induction). The Ninth Circuit has held that punishing an employee for disobeying an employer's unlawful order was contrary to public policy. *Garcia v. National Labor Relations*

Board, 785 F2d 807, 811 (1986) (refusal to violate California Vehicle Code)[8]

B. Agency's Duty to Obey the Law

In this case, the agency's order for suspicionless testing was seemingly unlawful at the relevant time and place. Unless and until reversed or modified, this employee was entitled to have relied upon the Ninth Circuit's decision. *See Rooker v. Fidelity Trust Co.*, 263 US 413, 415 (1923). Even where the law is given retroactive effect, it may be tempered to take into account a person's reliance on the existing law. *See James B. Beam Distilling Co. v. Georgia*, 111 SCt 2439, 2443 (1991). To say this is not to excuse this employee, but to suggest that, in the penalty phase of discipline, the agency's own obligation has been forgotten.

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[8] The Ninth Circuit commented:

> The Board may not be charged with enforcing all laws, but it surely is not empowered to condone law violation.
>
> We believe that even though UPS and other employers may think they have legitimate reasons for placing themselves above the law, we as a court of law must not reinforce such a view.

785 F2d at 811-12.

Although the Federal Aviation Administration may have believed the Ninth Circuit was in error, the agency was bound to follow the court's decision until reversed. A court's decree is binding even when temporary and even when critics doubt its constitutional foundation. *Walker v. City of Birmingham*, 388 US 12 (1967). The FAA should not have ordered Bruce Watson to submit to suspicionless drug testing. His disregard for an instruction may justify some form of discipline, but the agency's disregard for the constitution must serve to mitigate the penalty.

C. Significance Beyond the Facts

Bruce Watson was not hostile to the agency's interest in safety. He had worked eleven years to assure the safety of the public. He had nothing to hide. He was not suspected of drug use. He provided the agency an independent drug screening, in all likelihood, before the agency's test results would have been returned. He was "clean." To discharge him for failing to use the agency's authorized process at a time when that process

would be deemed unlawful is to inflict a capricious penalty.[9]

It is the novelty of these circumstances -- the employee's reliance on the known law and the agency's disregard of it -- that distinguishes this case and that warrants this court's attention to the final issue. This court's consideration would answer the relevance of changing law to penalty considerations, no matter who that decision-maker is to be. This court's consideration would illuminate the standards of review and make discretion more than an empty promise.

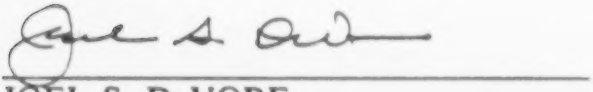
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[9] Additional considerations support finding a capricious penalty, but they are not recounted here. They are better reserved for a brief on the merits. They include, for example, consistency of the penalty in the light of the agency's schedule of discipline, if any. *Douglas v. Veterans Administration*, 5 MSPB at 331-32. By comparison, admitted drug users who undergo rehabilitation are not discharged. Exec Order 12564, § 5(b), 51 Fed Reg 32889 (1986); DOT Order 3910.6 (3910.1), Ch IV, § 1.

CONCLUSION

In the interest of federal agencies and employees alike, Gerald Bruce Watson, Jr., respectfully prays that a writ of certiorari issue to review the decisions below.

Respectfully submitted,



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